

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

KRISTEN DELANEY, individually and as parent of A.D., minor child; SEAN DELANEY; CAULIN DELANEY; EDWARD HANLON; TRACEY HANLON, individually and as parent of T.H., minor child; STEPHEN MURPHY; LESLIE PEASE; MATTHEW PEASE; LAURA PEASE; AND MEREDITH PEASE, individually and on behalf of all others similarly situated,

*Plaintiff,*

v.

THE 3M COMPANY, f/k/a Minnesota Mining and Manufacturing Co., AGC CHEMICALS AMERICAS INC., AMEREX CORPORATION, ARKEMA INC., ARCHROMA U.S. INC., BUCKEYE FIRE EQUIPMENT COMPANY, CARRIER GLOBAL CORPORATION, CHEMDESIGN PRODUCTS INC., CHEMGUARD INC. CHEMICALS, INC., CLARIANT CORPORATION, individually and as successor in interest to Sandoz Chemical Corporation, CORTEVA, INC., individually and as successor in interest to DuPont Chemical Solutions Enterprise, DEEPWATER CHEMICALS, INC., DUPONT DE NEMOURS INC., individually and as successor in interest to DuPont Chemical Solutions Enterprise, DYNAX CORPORATION, E. I. DUPONT DE NEMOURS AND COMPANY, individually and as successor in interest to DuPont Chemical Solutions Enterprise, KIDDE-FENWAL, INC., individually and as successor in interest to Kidde Fire Fighting, Inc., NATION FORD CHEMICAL COMPANY, THE CHEMOURS COMPANY, individually and as successor in interest to DuPont Chemical Solutions Enterprise, THE CHEMOURS COMPANY FC, LLC, individually and as successor in interest to DuPont Chemical Solutions Enterprise, and TYCO FIRE PRODUCTS, LP, individually and as successor in interest to The Ansul Company, and DOE DEFENDANTS 1-20, fictitious names whose present identities are unknown,

*Defendants.*

Civil Action No. \_\_\_\_\_

**NOTICE OF REMOVAL**

Defendants Tyco Fire Products LP and Chemguard, Inc. (collectively “Tyco”), by and through undersigned counsel, hereby give notice of the removal of this action, pursuant to 28 U.S.C. §§ 1332(d), 1441(a), 1442(a)(1), 1446, and 1453, from the Supreme Court of the State of New York, New York County, to the United States District Court for the Southern District of New York. As grounds for removal, Tyco alleges as follows on personal knowledge as to its own conduct and status and on information and belief as to all other matters:

**PRELIMINARY STATEMENT**

1. Plaintiffs Kristen Delaney, individually and as parent of A.D.; Sean Delaney; Caulin Delaney; Edward Hanlon; Tracey Hanlon, individually and as parent of T.H.; Stephen Murphy; Leslie Pease; Matthew Pease; Laura Pease; and Meredith Pease (collectively, “Plaintiffs”) seek to hold Tyco and certain other Defendants liable based on their alleged conduct in designing, manufacturing, marketing, distributing, and/or selling aqueous film-forming foam (“AFFF”) that Plaintiffs allege was used at the Amherst Fire Department (“AFD”) for firefighting activities.

2. Specifically, Plaintiffs allege that Defendants’ AFFF contained per- and polyfluoroalkyl substances (“PFAS”), including perfluorooctanoic acid (“PFOA”) and perfluorooctane sulfonic acid (“PFOS”), and that the use of these substances at AFD caused contamination of private groundwater wells near AFD from which Plaintiffs obtained their drinking water.

3. At least some of the AFFF that has been used at AFD over the years has been manufactured by a select group of suppliers (including Tyco) in accordance with the military’s rigorous specifications (“MilSpec AFFF”). Under the federal “government contractor” defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), Tyco is immune to tort

liability for its design and manufacture of MilSpec AFFF and its provision of warnings for the product. Under the federal officer removal statute, 28 U.S.C. § 1442, Tyco is entitled to remove this action in order to have its federal defense adjudicated in a federal forum. *See Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 810–15 (3d Cir. 2016). Such removal “fulfills the federal officer removal statute’s purpose of protecting persons who, through contractual relationships with the Government, perform jobs that the Government otherwise would have performed.” *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 133 (2d Cir. 2008).

4. Removal of this action is also proper under the Class Action Fairness Act, 28 U.S.C. § 1332(d) (“CAFA”). CAFA “provides the federal district courts with ‘original jurisdiction’ to hear a ‘class action’ if the class has more than 100 members, the parties are minimally diverse, and the ‘matter in controversy exceeds the sum or value of \$5,000,000.’” *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013) (citing 28 U.S.C. § 1332(d)(2), (d)(5)(B)); *Brook v. UnitedHealth Grp., Inc.*, 2007 WL 2827808, at \*2 (S.D.N.Y. Sep. 27, 2007). To determine whether the amount in controversy requirement under CAFA is satisfied, “the claims of the individual class members shall be aggregated.” *Knowles*, 568 U.S. at 592 (quoting § 1332(d)(6)). As shown below, each of the requirements for removal under CAFA is satisfied here.

### **BACKGROUND**

5. This action was filed on October 7, 2022, in the Supreme Court of the State of New York, New York County bearing Index No. 158595/2022. (Ex. A, Complaint). Venue is proper in this Court pursuant to 28 U.S.C. §§ 112(b) and 1441(a) because the Supreme Court of the State of New York, New York County, is located within the Southern District of New York.

6. Tyco accepted service on October 11, 2022. This Notice of Removal is timely filed in accordance with 28 U.S.C. § 1446(b).

7. Tyco is not required to notify or obtain the consent of any other Defendant in this action in order to remove Plaintiffs' action as a whole under § 1442(a)(1) or 1453(b). *See, e.g., Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1253 (9th Cir. 2006); *Hilbert v. McDonnell Douglas Corp.*, 529 F. Supp. 2d 187, 195 (D. Mass. 2008); *Linden v. Chase Manhattan Corp.*, No. 99 Civ. 3970(LLS), 1999 WL 518836, at \*1 (S.D.N.Y. July 21, 1999).

8. Plaintiffs generally allege that certain of the Defendants, including Tyco, have designed, manufactured, marketed, and/or sold AFFF products, which contain PFAS, including PFOS, PFOA, and/or their chemical precursors. Ex. A, Compl. ¶ 4. Plaintiffs allege that the AFFF designed, manufactured, marketed, and/or sold by Defendants, due to the use of AFFF in firefighting activities at AFD, has caused contamination of Plaintiffs' private drinking water wells near AFD. *Id.* ¶ 11. Plaintiffs further allege that they have incurred and will incur costs associated with this contamination, including costs for investigating, remediating, and monitoring their drinking water supplies. *Id.* ¶ 216; *id.* at Prayer for Relief.

9. Plaintiffs assert claims against all Defendants for defective design (*id.* ¶¶ 245–254), failure to warn (*id.* ¶¶ 255–261), negligence (*id.* ¶¶ 262–272), trespass (*id.* ¶¶ 273–278), and medical monitoring (*id.* ¶¶ 295–315). Plaintiffs assert two claims against E. I. DuPont de Nemours and Company and Chemours Co. for actual fraudulent transfer and constructive fraudulent transfer (*id.* ¶¶ 279–294). Plaintiffs also seek punitive damages (*id.* ¶¶ 316–319; *id.* at Prayer for Relief).

10. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon all parties to this action and a copy is being filed with the Clerk of the Supreme Court of the State of New York, New York County.

11. By filing a Notice of Removal in this matter, Tyco does not waive the rights of any Defendant to object to service of process, the sufficiency of process, jurisdiction over the person,

or venue; and Tyco specifically reserves the rights of all Defendants to assert any defenses and/or objections to which they may be entitled.

12. Tyco reserves the right to amend or supplement this Notice of Removal.

**REMOVAL IS PROPER UNDER THE FEDERAL  
OFFICER REMOVAL STATUTE, 28 U.S.C. § 1442**

13. Removal here is proper under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which provides for removal of an action relating to a defendant's acts undertaken at the direction of a federal officer. Removal is appropriate under this provision where the removing defendant establishes that: (a) it is a "person" within the meaning of the statute; (b) it acted under federal authority; (c) its actions taken pursuant to a federal officer's direction have a causal nexus with plaintiff's claims or injuries or are otherwise related to the lawsuit; and (d) it can assert a "colorable" federal defense. *See Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017); *cf. Mesa v. California*, 489 U.S. 121, 124–25, 129–31, 133–35 (1989); *Papp*, 842 F.3d at 812; *Cuomo v. Crane Co.*, 771 F.3d 113, 115 (2d Cir. 2014); *Hilbert v. McDonnell Douglas Corp.*, 529 F.Supp.2d 187, 196 (D.Mass.2008); *Isaacson*, 517 F.3d at 135; *Durham*, 445 F.3d at 1251.

14. Removal rights under the federal officer removal statute are much broader than under the general removal statute, 28 U.S.C. § 1441. Suits against defendants acting on behalf of federal officers "may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law." *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999). This is because § 1442(a)(1) protects "the government's need to provide a federal forum for its officers and those who are 'acting under' a federal office." *Albrecht v. A.O. Smith Water Prods.*, No. 11 Civ. 5990(BSJ), 2011 WL 5109532, at \*3 (S.D.N.Y. Oct. 21, 2011) (citation omitted). This important federal policy "should not be frustrated by a narrow, grudging interpretation of [§] 1442(a)(1)." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969); *see Durham*,

445 F.3d at 1252. To the contrary, § 1442 as a whole must be “liberally construe[d]” in favor of removal. *Papp*, 842 F.3d at 812 (alterations in original) (internal quotation marks omitted).

15. All requirements for removal under § 1442(a)(1) are satisfied where, as here, the notice of removal alleges that the plaintiff’s injuries are caused at least in part by MilSpec AFFF. *See, e.g., Nessel v. Chemguard, Inc.*, No. 1:20-cv-1080, 2021 WL 744683, at \*3 (W.D. Mich. Jan. 6, 2021) (denying motion to remand in AFFF case against Tyco and other manufacturers and holding that, notwithstanding plaintiffs’ assertion “that they do not seek resolution of any claims related to MilSpec AFFF[,] . . . Plaintiffs cannot decide what defense Defendants might present”); *Ayo v. 3M Co.*, No. 18-CV-0373(JS)(AYS), 2018 WL 4781145 (E.D.N.Y. Sept. 30, 2018) (denying motion to remand and finding that federal officer removal was proper in a lawsuit against Tyco and other manufacturers of MilSpec AFFF). The court overseeing the *In re Aqueous Film-Forming Foams Products Liability Litigation* multi-district litigation has also found on multiple occasions that removal under § 1442 is proper where the notice of removal alleges that plaintiffs’ injuries are caused, at least in part, by MilSpec AFFF. *See Order, In re AFFF Prods. Liab. Litig.*, MDL No. 2:18-mn-2873-RMG, ECF No. 103 (D.S.C. May 24, 2019) (“MDL Order 1”), at 3–6; *Order, In re AFFF Prods. Liab. Litig.*, MDL No. 2:18-mn-2873-RMG, ECF No. 320 (D.S.C. Sept. 27, 2019) (“MDL Order 2”), at 3–5; *Order, In re AFFF Prods. Liab. Litig.*, MDL No. 2:18-mn-2873-RMG, ECF No. 325 (D.S.C. Oct. 1, 2019) (“MDL Order 3”), at 3–6. Given its experience with the claims and defenses in AFFF litigation, the MDL Court’s holdings clearly demonstrate that this case, too, has been properly removed to federal court.<sup>1</sup>

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<sup>1</sup> Following removal, Tyco intends to designate this action for transfer to the MDL.

**A. MilSpec AFFF**

16. Since the 1960s, the United States military has used MilSpec AFFF on military bases, airfields (including Air National Guard facilities), and Navy ships—settings where fuel fires are inevitable and potentially devastating—to train its personnel, put out fires, save lives, and protect property. Indeed, the United States Naval Research Laboratory developed AFFF in response to catastrophic fires aboard the aircraft carriers *USS Forrestal* in 1967 and *USS Enterprise* in 1969.<sup>2</sup> Decades later, the Naval Research Laboratory described the development of AFFF as “one of the most far-reaching benefits to worldwide aviation safety.”<sup>3</sup>

17. The manufacture and sale of MilSpec AFFF is governed by rigorous military specifications created and administered by Naval Sea Systems Command. The applicable specification, Mil-F-24385, was first promulgated in 1969, and has been revised a number of times since then.<sup>4</sup> All MilSpec AFFF products must be qualified for listing on the applicable Qualified Products List prior to military procurement. Prior to such listing, a manufacturer’s products are examined, tested, and approved to be in conformance with specification requirements.<sup>5</sup> The MilSpec designates Naval Sea Systems Command as the agency responsible for applying these criteria and determining whether AFFF products satisfy the MilSpec’s requirements. After a product is added to the Qualified Products List, “[c]riteria for retention of qualification are applied

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<sup>2</sup> See Press Release 71-09r, U.S. Naval Research Lab., Navy Researchers Apply Science to Fire Fighting (Oct. 23, 2009), <https://tinyurl.com/y2jq4q4w>.

<sup>3</sup> U.S. Navy, NRL/MR/1001-06-8951, The U.S. Naval Research Laboratory (1923–2005): Fulfilling the Roosevelts’ Vision for American Naval Power 37 (2006) (“Fulfilling the Roosevelts’ Vision”), <https://permanent.fdlp.gov/gpo125428/roosevelts.pdf>.

<sup>4</sup> The 1969 MilSpec and all its revisions and amendments through April 2020 are available at <https://tinyurl.com/yxwotjpg>.

<sup>5</sup> Dep’t of Defense SD-6, Provisions Governing Qualification 1 (Feb. 2014), <https://tinyurl.com/y5asm5bw>.

on a periodic basis to ensure continued integrity of the qualification status.”<sup>6</sup> Naval Sea Systems Command reserves the right to perform any of the quality assurance inspections set forth in the specification where such inspections are deemed necessary to ensure supplies and services conform to prescribed requirements.

18. From its inception until very recently, the MilSpec included the express requirement that MilSpec AFFF contain “fluorocarbon surfactants.” All fluorocarbon surfactants are PFAS, and that category includes PFOA, PFOS, and their chemical precursors—the very compounds at issue in the Complaint here. This requirement has been in force for virtually the entire time period at issue in the Complaint. In 2019 the MilSpec removed the modifier “fluorocarbon” from “surfactants,” but it expressly states that “the DoD intends to acquire and use AFFF with the lowest demonstrable concentrations of . . . PFOS and PFOA” “[i]n the short term.” PFOA or PFOS are unavoidably present at some concentrations in fluorocarbon surfactants, and the current MilSpec expressly contemplates that AFFF formulations will contain PFOA and PFOS (subject to recently imposed limits).

**B. All the Requirements of 28 U.S.C. § 1442(a)(1) Are Satisfied**

*1. The “Person” Requirement Is Satisfied*

19. The first requirement for removal under the federal officer removal statute is satisfied here because Tyco Fire Products LP and Chemguard, Inc. (a limited partnership and corporation, respectively) meet the definition of “persons” under the statute. For purposes of § 1442(a)(1), the term “person” includes “corporations, companies, associations, firms, [and] partnerships.” *Papp*, 842 F.3d at 812 (quoting 1 U.S.C. § 1); *accord Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010); *Isaacson*, 517 F.3d at 135–36.

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<sup>6</sup> *Id.*



2. The “Acting Under” Requirement Is Satisfied

20. The second requirement (“acting under” a federal officer) is satisfied when an entity assists or helps carry out, the duties or tasks of a federal officer. *Papp*, 842 F.3d at 812. The phrase “acting under” is to be “liberally construed in favor of the entity seeking removal.” *Sawyer*, 860 F.3d at 255 (internal quotation marks omitted). Federal courts “have explicitly rejected the notion that a defendant could only be ‘acting under’ a federal officer if the complained of conduct was done at the specific behest of the federal officer or agency.” *Papp*, 842 F.3d at 813. Rather, “courts have unhesitatingly treated the ‘acting under’ requirement as satisfied where a contractor seeks to remove a case involving injuries arising from equipment that it *manufactured for the government*.” *Sawyer*, 860 F.3d at 255 (emphasis in original).

21. The requirement of “acting under” federal office is met here because the effect of Plaintiffs’ claims, at least in part, is to challenge Tyco’s alleged conduct in providing vital products “that, in the absence of Defendants, the Government would have had to produce itself.” *Isaacson*, 517 F.3d at 137. MilSpec AFFF is a mission-critical military and aviation safety product that, without the support of private contractors, the government would have to produce for itself. *See Ayo*, 2018 WL 4781145, at \*9 (describing MilSpec AFFF as a “mission-critical” and “life-saving product” used by all branches of the U.S. armed forces and NATO members (internal quotation marks omitted)); *cf. Isaacson*, 517 F.3d at 137. The Naval Research Laboratory states that, “[a]lthough [it] was responsible for the original concepts and formulations, it was necessary to elicit the aid of the chemical industry to synthesize the fluorinated intermediates and agents to achieve improvements in formulations.”<sup>7</sup> Accordingly, the military has long depended upon outside contractors like Tyco to develop and supply AFFF. *See Chemguard*, 2021 WL 744683, at

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<sup>7</sup> Fulfilling the Roosevelts’ Vision, *supra* n.3, at 37.

\*3 (holding that Tyco and other AFFF manufacturers were “acting under” a federal officer in connection with the manufacture and sale of MilSpec AFFF); *Ayo*, 2018 WL 4781145, at \*8–9 (same); *see also* MDL Order 1, at 3–6 (finding that the “acting under” requirement was satisfied because defendant demonstrated that it was manufacturing AFFF under the guidance of the U.S. military); MDL Order 2, at 3–5; MDL Order 3, at 3–6 (same). If Tyco and other manufacturers did not provide MilSpec AFFF, the government would have to manufacture and supply the product itself.

22. In designing, manufacturing, and supplying the MilSpec AFFF at issue, Tyco acted under the direction and control of one or more federal officers. Specifically, Tyco acted in accordance with detailed specifications, promulgated by Naval Sea Systems Command, that govern AFFF formulation, performance, testing, storage, inspection, packaging, and labeling. Further, the AFFF products in question were subject to various tests by the United States Navy before and after being approved for use by the military and for inclusion on the Qualified Products List maintained by the DoD.<sup>8</sup>

### 3. The Nexus Requirement Is Satisfied

23. The third requirement, that the defendant’s actions taken “under color of federal office” have a causal nexus with plaintiff’s claims or injuries or be otherwise related to the lawsuit, erects a hurdle that “is quite low.” *Isaacson*, 517 F.3d at 137.<sup>9</sup> To show the required nexus, it is sufficient for a defendant to establish only “a *connection or association* between the act in question

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<sup>8</sup> *See* Dep’t of Defense, SD-6, *supra* n.5, at 1.

<sup>9</sup> The “acting under” and “under color of” prongs overlap. Both “are satisfied if the actions subject to suit resulted directly from government specifications or direction.” *Albrecht*, 2011 WL 5109532, at \*5.

and the federal office.” *Sawyer*, 860 F.3d at 258 (quoting *Papp*, 842 F.3d at 813 (adding emphasis)).

24. Here, the Plaintiffs’ claims arise at least in part from Tyco’s production and sale of AFFF manufactured to military specifications. Plaintiffs allege that the use of PFAS in AFFF is the source of its injuries. Tyco contends that the use of such chemicals in MilSpec AFFF was required by military specifications. The conflict is apparent: MilSpec AFFF was developed by Tyco, and other manufacturers to meet specifications established by the DoD. The design choices Plaintiffs are attempting to impose via state tort law would create a conflict in which Tyco could not comply with both the MilSpec and the purported state-prescribed duty of care. *See Boyle*, 487 U.S. at 509; *see also Ayo*, 2018 WL 4781145, at \*9 (“[T]here is evidence of a ‘causal connection’ between the use of PFCs in AFFF and the design and manufacture of AFFF for the government.”); MDL Order 1, at 5–6 (“Here, [Plaintiff]’s claims arise out of use of AFFF products that it claims Tyco manufactured and sold, and for which the U.S. military imposes MilSpec standards. The Court . . . finds that the causation element of federal officer removal is satisfied here.”); MDL Order 2, at 5 (finding the causation element of federal officer removal satisfied where Tyco’s AFFF products, “for which the military imposes MilSpec standards,” were used at several airports); MDL Order 3, at 5–6 (same as to MilSpec AFFF used at a single airport).

25. Here, Plaintiffs’ purported injuries arise at least in part from MilSpec AFFF. The causal connection between Plaintiffs’ alleged injuries and Tyco’s actions under color of federal office is clear. It is irrelevant that the Plaintiffs do not expressly contend that it has been injured by MilSpec AFFF. Courts “credit Defendants’ theory of the case when determining whether [the] causal connection exists.” *Isaacson*, 517 F.3d at 137; *see also Chemguard*, 2021 WL 744683, at \*3 (noting that “Plaintiffs cannot decide what defense Defendants might present”).

4. The “Colorable Federal Defense” Requirement Is Satisfied

26. The fourth requirement (“colorable federal defense”) is satisfied by Tyco’s assertion of the government contractor defense.

27. At the removal stage, a defendant need only show that its government contractor defense is colorable, *Sawyer*, 860 F.3d at 254; that is, “that the defense was ‘legitimate and [could] reasonably be asserted, given the facts presented and the current law.’” *Papp*, 842 F.3d at 815 (alteration in original) (citation omitted). “A defendant ‘need not win his case before he can have it removed.’” *Id.* (quoting *Willingham*, 395 U.S. at 407); *see also Isaacson*, 517 F.3d at 139 (“To be ‘colorable,’ the defense need not be ‘clearly sustainable,’ as the purpose of the statute is to secure that the validity of the defense will be tried in federal court.” (citation omitted)); *O’Connell v. Foster Wheeler Energy Corp.*, 544 F. Supp. 2d 51, 54 (D. Mass. 2008) (upon removal, defendant must raise “colorable federal defense”). At the removal stage, the inquiry “is purely jurisdictional, and neither the parties nor the district courts should be required to engage in fact-intensive motion practice, pre-discovery, to determine the threshold jurisdictional issue.” *Cuomo*, 771 F.3d at 116.<sup>10</sup> Moreover, “this inquiry is undertaken whilst viewing the facts in the light most favorable to Defendants.” *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 783–84 (E.D. Pa. 2010). “Precisely in those cases where a plaintiff challenges the factual sufficiency of the defendant’s defense, the defendant should ‘have the opportunity to present [his] version of the facts to a federal, not a state, court.’” *Cuomo*, 771 F.3d at 116 (alteration in original) (citation omitted).

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<sup>10</sup> *See also Kraus v. Alcatel-Lucent*, No. 18-2119, 2018 WL 3585088, at \*2 (E.D. Pa. July 25, 2018) (“A court does not ‘determine credibility, weigh the quantum of evidence or discredit the source of the defense’ at this stage. Instead, [the court] only determine[s] whether there are sufficient facts alleged to raise a colorable defense.” (internal citation omitted)).

28. Under the government contractor defense, the defendant is not liable for the design, manufacture, or warnings of equipment or supplies “when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.” *Boyle*, 487 U.S. at 512.

29. Tyco has satisfied these elements for purposes of removal. As discussed above, Naval Sea Systems Command approved reasonably precise specifications, governing MilSpec AFFF formulation, performance, testing, storage, inspection, packaging, and labeling. Tyco’s products appeared on the DoD Qualified Products List, which could have happened only if Naval Sea Systems Command had first determined that they conformed to the MilSpec. *See Ayo*, 2018 WL 4781145, at \*13 (“[T]here is colorable evidence that Manufacturing Defendants’ Mil-Spec AFFF is not a stock product and that the government approved reasonably precise specifications requiring them to use PFCs, including PFOS and PFOA, in their products.”); *see also id.* (“There is also colorable evidence . . . that Manufacturing Defendants’ AFFF products conformed to the government’s reasonably precise specifications.”); MDL Order 1, at 5 (finding defendant demonstrated a colorable defense “where it contends that its AFFF products were manufactured according to the U.S. military’s MilSpec specifications”); MDL Order 2, at 4 (same, as to Tyco); MDL Order 3, at 5 (same); *see also Chemguard*, 2021 WL 744683, at \*4.

30. Moreover, the government was sufficiently informed regarding alleged product-related “dangers,” *Boyle*, 487 U.S. at 512, to exercise its discretionary authority in specifying and procuring MilSpec AFFF. The military specifications have long included testing protocols and requirements for toxicity, chemical oxygen, and biological demand. Indeed, it is clear that the United States has long understood that AFFF contains PFAS and may contain or break down into

PFOS and/or PFOA; that AFFF constituents can migrate through the soil and potentially reach groundwater; and that it has been reported that this may raise environmental or human health issues.<sup>11</sup> For example, as early as October 1980, a report supported by the U.S. Navy Civil Engineering Laboratory, U.S. Air Force Engineering Service Center, and the U.S. Army Medical Research and Development Command stated that AFFF contained fluorocarbons and that “[a]ll of the constituents resulting from fire fighting exercises are considered to have adverse effects environmentally.”<sup>12</sup> By no later than 2001, DoD was aware of data purportedly showing PFAS compounds in MilSpec AFFF to be “toxic” and “persistent.” In 2002, the United States Environmental Protection Agency issued a draft hazard assessment for PFOA, which reviewed in detail, among other data, human epidemiological studies and animal toxicology studies pertaining to alleged associations between PFOA and cancer. More recently, in a November 2017 report to Congress, the DoD acknowledged the concerns raised by the EPA regarding PFOS and PFOA. Nonetheless, it still described AFFF containing PFOS or PFOA as a “mission critical product [that] saves lives and protects assets by quickly extinguishing petroleum-based fires.”<sup>13</sup> Indeed, Naval Sea Systems Command continues to require that MilSpec AFFF contain “surfactants,” and recognizes that PFAS, including PFOS and PFOA, will be present (subject to recently imposed limits for PFOS and PFOA) in AFFF formulations.<sup>14</sup> See *Ayo*, 2018 WL 4781145, at \*12 (“That

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<sup>11</sup> See, e.g., EPA, *Revised Draft Hazard Assessment of Perfluorooctanoic Acid and Its Salts* 1–6 (Nov. 4, 2002).

<sup>12</sup> See Edward S. K. Chian et al., *Membrane Treatment of Aqueous Film Forming Foam (AFFF) Wastes for Recovery of Its Active Ingredients* 1 (Oct. 1980), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a136612.pdf>.

<sup>13</sup> Dep’t of Defense, *Aqueous Film Forming Foam Report to Congress* 1–2 (Oct. 2017) (pub. Nov. 3, 2017), <https://tinyurl.com/wshcww4>.

<sup>14</sup> See MIL-PRF-24385F(SH), Amendment 4, § 6.6 & Tables I, III (2020), [https://quicksearch.dla.mil/qsDocDetails.aspx?ident\\_number=17270](https://quicksearch.dla.mil/qsDocDetails.aspx?ident_number=17270); see also David Vergun,

the DoD knows of the alleged risks of PFC-based AFFF products but continues to purchase them supports the position that the government approved reasonably precise specifications for the claimed defective design.”); MDL Order 1, at 5 (“As to whether [defendant] adequately informed the U.S. military of dangers associated with its AFFF products of which the military was not already aware, [defendant] points to materials such as a November 2017 Department of Defense report to Congress, in which the agency acknowledged the [EPA]’s stated concerns with PFOS/PFOA in drinking water . . .”).

31. At minimum, these facts constitute colorable evidence that Naval Sea Systems Command “made a discretionary determination” regarding the formulation of MilSpec AFFF after weighing the fire-suppression benefits against the alleged risks. *See Twinam v. Dow Chem. Co. (In re “Agent Orange” Prod. Liab. Litig.)*, 517 F.3d 76, 90 (2d Cir. 2008); *see also Albrecht*, 2011 WL 5109532, at \*5 (“A defendant is not required to warn the government where ‘the government knew as much or more than the defendant contractor about the hazards of the product.’” (citation omitted)). Where, as here, the government has exercised “discretionary authority over areas of significant federal interest such as military procurement,” the government contractor defense applies. *In re “Agent Orange” Prod. Liab. Litig.*, 517 F.3d at 89–90; *see also Ayo*, 2018 WL 4781145, at \*13.

32. Tyco’s use of PFAS in MilSpec AFFF was required by military specifications. By seeking to impose tort liability on Tyco for alleged injuries to Plaintiffs that were caused in whole or in part by Tyco’s compliance with military specifications, Plaintiffs are attempting to use state

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*DOD Officials Discuss Fire-Fighting Foam Replacement, Remediation Efforts* (Sept. 16, 2020), <https://tinyurl.com/ty5ku8hp>.

tort law to attack design choices dictated by the military. The government contractor defense precludes such an attack. *See Boyle*, 487 U.S. at 509.

**REMOVAL ALSO IS PROPER UNDER THE  
CLASS ACTION FAIRNESS ACT, 28 U.S.C. § 1332(d)**

33. In the alternative, removal here is also proper under CAFA, which “vests district courts with original jurisdiction over class actions where: (1) the putative class is composed of at least 100 members; (2) any class member is diverse from any defendant; and (3) the aggregate amount in controversy exceeds five million dollars, exclusive of interest and costs.” *Brook*, 2007 WL 2827808, at \*2 (citing 28 U.S.C. § 1332(d)(2)(A)); *see also Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 213 (2d Cir. 2013) (citing 28 U.S.C. § 1332(d)(2)-(6)).

34. Tyco is not required to notify or obtain the consent of any other Defendant to remove this action pursuant to CAFA. *See* 28 U.S.C. § 1453(b).

**A. The Numerosity Requirement Is Satisfied.**

35. The first requirement for removal under CAFA is that the plaintiffs seek to certify a class composed of at least 100 members. *See Brook*, 2007 WL 2827808, at \*2.

36. Plaintiffs invoke Article 9 of the New York Civil Practice Law and Rules, Section 901, and seek to represent other persons on a class basis. Compl. ¶ 222. Accordingly, this case is a “class action” within the meaning of CAFA because it is brought pursuant to a “State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” 28 U.S.C. § 1332(d)(1)(B).

37. The numerosity requirement is met here. Plaintiffs seek to represent a putative class of “all individuals who currently or formerly lived within ten (10) miles of the AFD.” Compl. ¶ 221. The Complaint alleges that “the number of impacted individuals, upon information and belief, is in the hundreds,” *id.* ¶ 225, and that Plaintiffs “expect[] that the Class Members will



number in the hundreds,” *id.* ¶ 226. Thus, this action satisfies the requirement for removal that “the number of members of all proposed classes in the aggregate” is equal to or greater than 100. *See Brook*, 2007 WL 2827808, at \*2; 28 U.S.C. § 1332(d)(5)(B).

**B. The Minimal Diversity Requirement Is Satisfied.**

38. The CAFA requirement of minimal diversity is satisfied when “any member of a class of plaintiffs is a citizen of a State different from any defendant.” *See* 28 U.S.C. § 1332(d)(2). Moreover, under CAFA, an action “may be removed to a district court of the United States in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought.” 28 U.S.C. § 1453(b).

39. Here, the Complaint alleges that the named Plaintiffs are residents of New Hampshire. *See* Compl. ¶¶ 20–26, 221–22. Upon information and belief, the named Plaintiffs are citizens of the state in which they reside; thus, they are citizens of New Hampshire. The Complaint alleges that numerous Defendants are citizens of states other than New Hampshire. For example, the Complaint alleges that Defendant Chemguard, Inc. is a corporation organized under the laws of Texas and has its principle place of business in Wisconsin. ¶ 41. Therefore, Chemguard is a citizen of Texas and Wisconsin

40. Because the named Plaintiffs and Chemguard (among other Defendants) are not citizens of the same state, the minimal diversity requirement is satisfied here.

**C. The Amount in Controversy Requirement Is Satisfied.**

41. Third, under CAFA, the amount in controversy must exceed five million dollars (\$5,000,000), exclusive of interest and costs. *See* 28 U.S.C. § 1332(d)(2). In a putative class action, the amount in controversy is determined by aggregating the claims of all members of the putative class. *See* 28 U.S.C. § 1332(d)(6); *see also Henry v. Warner Music Group Corp.*, 2014

WL 1224575, at \*2 (S.D.N.Y. Mar. 24, 2014) (“To satisfy the jurisdictional amount requirement under the CAFA, Defendants must demonstrate “to a ‘reasonable probability’ that the aggregate claims of the plaintiff class are in excess of \$5 million.” (quoting *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006))). In addition to compensatory damages, a court “must also consider” both “punitive damages” and “attorney’s fees” “when calculating the amount in controversy” under CAFA. *Frederico v. Home Depot*, 507 F.3d 188, 199 (3d Cir. 2007). The Supreme Court has made clear that “a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 81 (2014).

42. Although Tyco denies that Plaintiffs and the putative class are entitled to any monetary or other relief, the amount in controversy here exceeds the jurisdictional minimum. In this action, Plaintiffs and hundreds of putative class members seek to recover damages incurred, and to be incurred, associated with “the harm done to their wells and properties, and the costs associated with investigating, remediating, and monitoring their drinking water supplies.” Compl. ¶ 16. Specifically, Plaintiffs demand damages including, but not limited to, costs and expenses related to the past, present, and future: (i) “investigation, sampling, testing, and assessment of the extent of PFAS contamination at Amherst, NH”; (ii) “treatment and remediation of PFAS contamination at Amherst, NH”; and (iii) “installation and maintenance of filtration systems to assess and evaluate PFAS at Amherst, NH.” *Id.* at Prayer For Relief. These damages would apply to anyone who resides within ten miles of the AFD. *Id.* ¶ 221.

43. Plaintiffs seek additional amounts “to fund a medical monitoring program” into the indefinite future. *Id.* ¶ 221–315; *id.* at Prayer For Relief. The proposed monitoring program would be as expansive as it would be costly. Plaintiffs seek relief that would include, but not be limited

to: (i) “[e]stablishing a program that provides education and outreach on the existence and availability of the services established under the Monitoring Program . . .”; (ii) “[f]unding additional studies of the long-term effects of exposure to PFOS, PFOA, and/or their chemical precursors”; (iii) “[f]unding medical surveillance for informing current or former residents located downgradient of the AFD about the program”; (iv) “[f]unding research into possible treatments for the detrimental effects of PFAS exposure . . .”; (v) “[g]athering and forwarding to the treating physician of Plaintiffs and each [class member] information related to the diagnosis and treatment of injuries resulting from their exposure to PFAS”; and (vi) “[a]ssisting in the early diagnosis and treatment of injuries resulting from exposure to PFAS through ongoing testing and monitoring of Plaintiffs and each [class member]. *Id.* ¶ 306. Such a monitoring program would apply to both current and past residents of Amherst, which Plaintiffs estimate would include “hundreds” of individuals. *Id.* ¶ 225.

44. Additionally, Plaintiffs request the Court to grant relief avoiding certain transfers made by Defendant Chemours Co. to Defendant DuPont, “including but not limited to [a] \$3.9 billion dividend.” *Id.* ¶¶ 280-285.

45. Finally, Plaintiffs also request punitive damages. *Id.* ¶¶ 316–19; *id.* at Prayer For Relief.

46. Given all of these demands, as well as the scope of the putative class and the breadth of the relief sought, it is apparent that the aggregate amount in controversy is greater than \$5,000,000, exclusive of interest and costs. Accordingly, although Tyco denies that Plaintiffs or any putative class members are entitled to recover any amount, and denies that Plaintiffs or putative class members are entitled to any of the relief sought, the amount in controversy requirement for removal under CAFA is satisfied.

47. Because the numerosity, minimal diversity, and amount in controversy requirements of CAFA are satisfied, this case is subject to removal to federal court under CAFA.

WHEREFORE, Tyco hereby removes this action from the Supreme Court of the State of New York, New York County, to this Court.

RESPECTFULLY SUBMITTED this 8th day of November, 2022.

ARCHER & GREINER P.C.

/s/ Thomas J. Herten

Thomas J. Herten  
Nicole G. McDonough  
Court Plaza South, West Wing  
21 Main Street, Suite 353  
Hackensack, NJ 07601-7095  
(201) 498-8502  
therten@archerlaw.com  
nmcdonough@archerlaw.com

*Counsel for Tyco Fire Products LP  
and Chemguard Inc.*

**CERTIFICATE OF SERVICE**

I, Nicole G. McDonough, hereby certify that this document filed through the ECF system will be sent electronically all registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants on this date including plaintiffs.

Dated: November 8, 2022

/s/ Nicole G. McDonough

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